TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

U.S. CONSTITUTION:

OTHER AUTHORITIES:

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. 91-1526

FERRIS J. ALEXANDER, SR.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL DEFENSE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS IN THIS CASE[1]

Amicus is a 20-year old organization representing Christian families, churches, and ministries in defending freedom of conscience and religious liberty for all through direct daily representation in Washington, D.C., newsletters and other materials, seminars on current national issues, and litigation.

---

[1]Counsel of record to the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

SUMMARY OF ARGUMENT

This Court's decisions in *Young v. American Mini Theatres, Inc.*,[2] and *City of Renton v. Playtime Theatres, Inc.*,[3] regarding nonobscene sexually explicit speech mirror doctrinal developments relative to permissible defamation, commercial speech, and expressive conduct. Due to the comparatively limited First Amendment value of such speech types, they are not entitled to full First Amendment protection although their close relationship to other speech types requires some intermediate level of protection.

Thus, while the government may not be able to suppress Petitioner's nonobscene sexually explicit speech prior to his RICO conviction, it can impose penalties like forfeiture even though the possibility of those penalties may have a chilling effect. Likewise, the government may act under overbroad statutes that could reach mere sexually explicit speech, and may subject sexually explicit speech to prior restraint, just as it may in connection with commercial speech.

ARGUMENT

I. NONOBSCENE SEXUALLY EXPLICIT SPEECH IS ONLY INTERMEDIATELY PROTECTED UNDER YOUNG V. AMERICAN MINI THEATRES AND OTHER DECISIONS.

This Court has granted a limited, intermediate protection under the First Amendment to certain types of speech previously without any protection from governmental restriction. Those types of speech are commercial speech, permissible defamation, and erotic and other kinds of expressive conduct. Like those types, nonob-

---

[2] 427 U.S. 50 (1976)(plurality opinion).

[3] 475 U.S. 41 (1986).

Appreciation is expressed to F. Tayton Dencer for his review and criticism of the text of this brief.

scene sexually explicit speech has limited First Amendment value if it has any First Amendment value at all, and has been and should be only intermediately protected.

A. A Category Of Speech That Is Only Intermediately Protected Is Desirable.

1. Intermediate Protection Prevents Total Exclusion.

Some sort of speech categorization is inevitable because full First Amendment protection is not applied to every spoken or printed word or illustration; that Amendment simply does not extend absolutely to every utterance or expression.[4] Certain types of speech are entirely without protection because they do not have First Amendment value. For example, fighting words,[5] terroristic or extortionate threats,[6] immediate seditious advocacy,[7] and other criminally instrumental words[8] are without protection because they are merely verbal con-

---

[4] *E.g.*, Miller v. California, 413 U.S. 15, 23 (1973); Konigsberg v. State Bar, 366 U.S. 36, 49-51 (1961).

[5] *E.g.*, Cox v. Louisiana, 379 U.S. 559, 563 (1965); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[6] *E.g.*, Watts v. United States, 394 U.S. 705, 707 (1969); Masson v. Slaton, 320 F. Supp. 669, 672 (N.D. Ga. 1970).

[7] *E.g.*, Scales v. United States, 367 U.S. 203, 228-29 (1961); Dennis v. United States, 341 U.S. 494, 501-02 (1951) (plurality opinion).

[8] *E.g.*, Cox v. Louisiana, 379 U.S. 559, 563 (1965); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

duct tantamount to nonverbal physical attack, subversion, or crime, and have little if any relation to the intellectual communication that is the most clear goal of the First Amendment. Likewise unprotected are obscenity and child pornography,[9] which, taken as a whole, are mere physical stimulation through nonideational verbal or pictorial incitement.[10]

That prevailing approach to the scope of the Speech Clause, categorizing speech as without protection according to its relation to First Amendment values, strongly supports the possibility of categorization of certain speech as only intermediately protected.[11] In fact, since not all speech within the arguable scope of the clause has equal First Amendment value, an intermediate level of protection is necessary to avoid cost to speech whose First Amendment

---

[9] *E.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct. 2794 (1985); New York v. Ferber, 458 U.S. 747, 764 (1982); Miller v. California, 413 U.S. at 23; Roth v. United States, 354 U.S. 476, 481, 485 (1957); *See* Schauer, *Speech and "Speech"--Obscenity and "Obscenity": an Exercise in the Interpretation of Constitutional Language*, 67 Geo. L.J. 899 (1979) (defending two-level approach to obscenity as unprotected).

[10] *E.g.*, D. Barber, *Pornography and Society* 91 (1972); Schauer, *supra* note 9, at 922-23 ("the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of the communicative process" and is "a sexual surrogate").

[11] Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 206, 212-13 (1982); Schauer, *supra* note 9, at 282-296; Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519, 538-42 (1979).

value is greater.[12] Granting full protection to speech with great potential for harm and only marginal First Amendment value is illogical, and simply will not occur; exclusion is more likely. Thus, granting such speech only intermediate protection may save it from exclusion.[13]

2. Intermediate Protection Requires the Court To Determine First Amendment Values Rather Than Societal Values and Thus Strengthens the First Amendment.

The initial scholarly criticisms of categorization focused on the tendentiousness (or at best arbitrariness) of distinguishing certain kinds of expression from others in terms of their social worth. Social worth, meaning the value of a certain type of speech to the majority, obviously cannot serve as the criterion for delimiting the scope of the Free Speech Clause, for it would render the clause superfluous.[14] However, categorization of certain types of speech as entitled to only intermediate protection does not depend

---

[12] The scope of the clause may, of course, be defined in such a way that a uniform level of protection makes sense, but only at the cost of excluding important forms of expression from its coverage. *See* Schauer, *supra* note 9, at 275.

[13] *E.g.*, *id.* at 286. *See* R. Dworkin, *Taking Rights Seriously*, 261 (1977); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 52 Ind. L. J. 399, 420 (1978) (scope and intensity of review, while different issues, are nonetheless related, for "one who thinks he has a mandate to review everything may respond by reviewing nothing very seriously.")

[14] *See*, Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 887-893 (1963) (discussing dynamics of majoritarian pressures against constitutional values).

upon, and in fact has no necessary connection to, the notion of social worth.[15] Rather, such categorization depends upon the First Amendment value of such speech types, which may be determined from the framers' purpose and intended meaning for the amendment,[16] or in other ways.[17]

Regardless of how the Court determines First Amendment values, doing so doubtless will do much to rescue the First Amendment from popular frustration and cynical attitudes engendered by the abuse of destructive profiteers.

B. The Court Has Recognized a Category of Certain Types of Speech Entitled to Only Intermediate Protection.

The Court's past exclusion of certain classes of speech from all protection demonstrates the need for an intermediate level of protection. The Court has treated obscenity, commercial speech, libel, and fighting

---

[15] *Cf.* Fort Wayne Books, Inc. v. Indiana, 103 L. Ed. 2d 34, 62 (Stevens, J., dissenting)("[P]ublic interest in access to sexually explicit materials remains strong despite continuing efforts to stifle distribution.")

[16] *E.g.*, W. Berns, *The First Amendment and the Future of American Democracy* (1976); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

[17] *E.g.*, BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299 (1978); Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. Rev. 964 (1978); Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 210-213 (1982); Note, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854, 1859 (1983).

words, among others, as subcategories of unprotected utterance.[18] Conduct can be added to this list as a generic subcategory, because it functioned in the Court's doctrine as another line for delineating the scope of the Speech Clause.[19] Over the past twenty-five years, the Court has modified its treatment of commercial speech,[20] libel,[21] fighting words,[22] and conduct[23] to allow partial,

---

[18] *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. at 571-72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ."); Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942) (commercial advertising unprotected); Roth v. United States, 354 U.S. 476, 481, 485 (1957) (obscenity etc.); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (nonprivileged defamation).

[19] *E.g.*, Cox v. Louisiana, 379 U.S. 559, 563 (1965); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); Teamsters Local 802 v. Wohl, 315 U.S. 769, 776-77 (1942).

[20] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)

[21] New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964).

[22] The fighting words category has never been formally revised, as have each of the others, but the Court's treatment of it has clearly limited it, if not eliminated it. *See, e.g.*, Eaton v. City of Tulsa, 415 U.S. 697 (1974); Hess v. Indiana, 414 U.S. 105 (1973). The Court has applied the overbreadth doctrine to strike down state statutes purporting to authorize punishment of fighting words. *See* Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

but not full, protection for some, but not all, expression within each. The common characteristics of those types of speech are (1) that they involve limited First Amendment value (substantive characteristic), and (2) that they may be difficult to discern from or segregate from fully protected speech (strategic characteristic).

1. Libel.

The libel decisions paradigmatically illustrate both the strategic and the substantive characteristics calling for intermediate protection. Prior to the Court's decision in *New York Times v. Sullivan*,[24] the states were free to regulate and punish libel. In that case, the Court ruled that it was necessary to protect some defamatory falsehood if nondefamatory expression were to have the "breathing space" it needed to survive.[25] The Court has interpreted its action as extending "a measure of strategic protection to defamatory falsehood."[26] The *New York Times* case limited this strategic protection to libel of public officials, as distinct from all forms of libel,[27] and to publication without malice in regard to the falsity of the statements.[28] Thus, the Court carved out from unprotected libel an area to

---

[23]United States v. O'Brien, 391 U.S. 367, 377 (1968).

[24]376 U.S. 254 (1964).

[25]*Id.* at 271-72, (*quoting* N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1962)).

[26]Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

[27]376 U.S. at 283.

[28]*Id.* at 279-80.

which it extended limited protection.[29]

Although libel's strategic characteristic dominated the Court's opinion in *New York Times*, a substantive characteristic is implicit. Libel contains many of the aspects of protected speech; thus, it appears to fall within the First Amendment. However, it does not deserve full protection because its primary purpose, dissemination of falsehood, quite clearly is not a First Amendment value.

2. Commercial Speech.

The commercial speech addressed by the Court contains substantive and strategic characteristics similar to those of libel. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[30] the Court granted a measure of protection to previously unprotected commercial speech. As in *New York Times*, the Court recognized that some, though not full, protection ought to be accorded to commercial speech,[31] and that this protection would extend to some, but certainly not all, forms of

---

[29]*See also* Gooding v. Wilson, 405 U.S. 518, 521 (1972)(quoting NAACP v. Button, 371 U.S. 415, 433 (1963)), in which the author of *New York Times*, Justice Brennan, referred to the necessity to protect fighting words of limited First Amendment value in order to protect other speech: "'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'"

[30]425 U.S. 748 (1976).

[31]*Id.* at 771-72 & n.24. Because the protection accorded is not full, the First Amendment "allow[s] modes of regulation that might be impermissible in the realm of noncommercial expression." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

commercial utterance.[32] Leaving aside for the most part the strategic rationale, the Court in *Virginia Pharmacy* sought to ground its decision in the view that commercial speech is substantively different from other forms of speech.[33] The Court elaborated this view in *Ohralik v. Ohio State Bar Association* and numerous other decisions:

> In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra*, at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n.24. We have not discarded the "common-sense" distinction between speech proposing a commercial transaction . . . and other varieties of speech. *Ibid*. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a *limited measure of protection*, commensurate with its *subordinate position* in the scale of First Amendment values . . . .[34]

---

[32] 425 U.S. at 764 (recognizing differing public interest in different commercial messages).

[33] 425 U.S. at 761, 771-72 n.24.

[34] 436 U.S. at 455-56 (1978)(emphasis added). *Accord*, Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. 557, 562-63 (1980); Friedman v. Rogers, 440 U.S. 1, 10-11 n.9 (1979); SEC v. Lowe, 725 F.2d 892, 901 n.6 (2d Cir. 1984)("'middle level' protection . . . for . . . commercial advertising"), *rev'd*, 472 U.S. 181 (1985); *see generally* Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. Chi. L. Rev. 205, 222-54 (1976); Roberts, *Toward a General Theory of Commercial Speech and the First Amendment*, 40 Ohio St. L.J. 115, 131 (1979).

Although the speech component suggests some First Amendment protection is due, the Court denied that full protection can be afforded to commercial speech, for the state cannot "lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."[35]

At a strategic level, commercial speech that involves limited First Amendment value may be difficult to discern from fully protected speech, although not as difficult to discern as libel. Also, aspects of commercial speech with limited First Amendment value may be difficult to segregate from those aspects with clear First Amendment value.[36] Just as the problem of libel presented a combination of falsehood and nonfalse speech, so commercial speech is a mixture of argument and solicitation.

3. Conduct.

Some early decisions implied an absolute dichotomy between speech and conduct, with speech being fully

---

[35] Friedman v. Rogers, 440 U.S. at 10-11 n.9 (*quoting* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

[36] *See* Posadas de Puerto Rico Associates v. Tourism Company, 92 L.Ed.2d 266 (1986). The Court upheld restriction of commercial advertising of gambling while acknowledging that the government's purpose was to prevent encouragement of gambling. Such general encouragement, as opposed to solicitation to frequent a particular establishment, seems clearly to be a value of the First Amendment.

protected and conduct wholly unprotected.[37] Later decisions recognized that the speech component of expressive conduct deserved protection.[38] Nevertheless, much that is expressive in conduct does not implicate in any substantial way First Amendment values, so such conduct was entitled to only limited protection. For example, in *Barnes v. Glen Theatre, Inc.*,[39] the Court recognized that "almost limitless types of conduct - including appearing in the nude in public - are 'expressive,' . . . in one sense of the word," but that the more graphic expression added by totally nude dancing could be limited. Indeed, to accord full protection for all conduct that has an expressive dimension would too greatly undermine the state's power to regulate conduct, just as with commercial advertising. Thus, the rule fashioned by the Court provides a form of limited protection; the state can regulate expressive conduct if it has a substantial interest unrelated to the suppression of political expression.[40]

The prevailing rule regarding nonobscene sexually explicit conduct such as nonobscene topless or bottomless dancing is that only limited First Amendment protection applies to it, although "nude dancing is not

---

[37] *E.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[38] *See, e.g.*, Brown v. Louisiana, 383 U.S. 131 (1966).

[39] 111 S.Ct. 2456, 2463 (1991) (plurality opinion).

[40] *E.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968). *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 702 (1986)(O'Brien involved "scrutiny of a statute regulating conduct which has the incidental effect of burdening the expression of a *particular political opinion.*)(emphasis supplied).

without its First Amendment protections."[41] This is evident in the Supreme Court decisions in *California v. LaRue*[42] and *New York State Liquor Authority v. Bellanca*,[43] which upheld prohibitions of nude dancing and topless dancing, respectively, in establishments with liquor licenses.[44]

On a substantive level, then, regulation of expression that implicates First Amendment values in only a marginal way logically does not violate the First Amendment. On a strategic level, however, sensitivity to clear First Amendment values requires that such expression be afforded some protection. The development of a theory of intermediate protection is, thus, a response calibrated to accommodate legitimate state interests while protecting First Amendment values.

C. Nonobscene Sexually Explicit Speech Falls Within the Category of Intermediately Protected Speech.

---

[41] Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 66. (1981) *See also* Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) ("might be entitled to . . . protection under some circumstances").

[42] 409 U.S. 109 (1972).

[43] 452 U.S. 714 (1981) (per curiam).

[44] 409 U.S. at 118; 452 U.S. at 715-18. Although the Court stressed the states' regulatory authority under the Twenty-first Amendment, it did not state or intimate that such regulation would constitute a compelling state interest, and therefore allowed regulation of nude and topless dancing that would not be permissible for fully protected expression. *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding regulation, *inter alia*, of "Group D cabarets" with partially nude performance, on the basis of legitimate state interest).

If one visualizes a continuum of expression ranging from total obscenity to fully protected forms of expression, nonobscene erotic material would fall somewhere between those conceptual endpoints.[45] As the erotic component of expression becomes increasingly dominant and conspicuous, the expression would begin to look more and more like obscenity, until at some point it passes into that unprotected status.[46] It would be both unrealistic and theoretically inconsistent with this graduated view of expression to impose a total transmogrification at some specific point on the continuum from nonobscenity to obscenity. More realistic and consistent is categorizing nonobscene erotic speech as entitled to the same intermediate protection to which commercial speech, permissible defamation, and expressive conduct are entitled.

1. Limited First Amendment Value.

Although the "portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press,"[47] that

---

[45] *Cf.* Note, *Anti-Pornography Laws and First Amendment Values*, 98 Harv. L. Rev. 460, 469-474 (1984) (discussing hybrid character of pornography).

[46] *Cf.* California v. LaRue, 409 U.S. 109, 117 (1972) ("as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increase").

[47] Roth v. United States, 354 U.S. 476, 487 (1957) (footnote omitted). *E.g.*, Schad v. Village of Mount Ephraim, 452 U.S. at 66 (1981) (nudity).

Although in Roth the Court stated that "[a]ll ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion"--have full First Amendment protection, 354

principle does not mean that sexual acts or similar conduct are protected by the First Amendment at all,[48] and it does not demand the same degree of protection for erotic material as for traditionally protected speech and press.[49]

Nonobscene sexually explicit material involves little, First Amendment value. The purpose and effect of such material is not intellectual stimulation but merely physical stimulation, as demonstrated in part by the limited verbal aspect of much of that material. Moreover, purchasers, authors and vendors of such erotic materials are carrying on commercial noncommunicative

---

U.S. at 484, this dictum means only that ideas are fully protected, whether political, literary, artistic, and scientific, not that the predominant conduct of sexually-explicit material is fully protected. In fact, when Roth was decided, much of the erotic material involved in the instant case probably would have been considered obscene and thus unprotected.

[48] *E.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 & n.13 (1973); Lovisi v. Slayton, 539 F.2d 349, 351-52 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976).

[49] Ascribing only partial First Amendment protection to erotic material does not reduce the constitutional protection for such expression; instead, it results from the relatively recent shift of erotic material from the unprotected category to some protection. *E.g.*, Schauer, *supra* note 9, at 907-08 & n.50 (courts have given First Amendment protection but reduced its level in such areas as nonobscene erotic material and nonobscene indecent language); *compare* Schauer, *The Law of Obscenity* 21-22 (1976) (in obscenity prosecutions in the nineteenth century, "almost anything that concerned sexual relationships in any way was presumed to be obscene") *and* Commonwealth v. Holmes, 17 Mass. 336 (1821) (example of same) *with* Miller v. California, 413 U.S. at 24 (narrow test for obscenity).

action rather than sincerely conveying any First Amendment expression.[50] Erotic material is closer to unprotected obscenity, prostitution, sexual solicitation, and nonartistic public nudity than to protected expression of any type. In this sense, nonobscene sexually explicit material shares many of the very characteristics of unprotected sexually explicit expression, like obscenity and child pornography, that render it unprotected. In fact, the Court in both *Ferber*[51] and *Osborne v. Ohio*,[52] in addition to noting the danger posed to children by child pornography, noted that "the value of permitting child pornography" is "'exceedingly modest, if not de minimis.'"

2. Relation to Other Speech.

While nonobscene sexually explicit expression may contain some characteristics of speech, and thus have some limited First Amendment value, and while such expression may be entwined with speech implicating more clearly First Amendment values, restriction short of actual suppression strikes a reasonable balance between the state's interest and such fully protected speech. As with advertising, anything more than limited protection for erotic material "could invite dilution, simply by a leveling process, of the force of the [First]

---

[50] *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. at 70; California v. LaRue, 409 U.S. at 118 ("in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication"); Schauer, *Response: Pornography and the First Amendment*, 40 U. Pitt. L. Rev. 605, 608 (1979) ("none of the philosophical justifications of a distinct concept of freedom of speech would put direct sexual excitement within the confines of that principle").

[51] 458 U.S. at 762.

[52] 495 U.S. 103, 108 (1990).

Amendment's guarantee with respect to the latter kind of speech."[53]

3. State Interest.

Moreover, the limited First Amendment value of such speech is dwarfed by the potential harm of such speech. Joining theological conservatives and political conservatives who cite the negative impact on morality and family stability, feminists generally are attacking most such erotic material because of its degradation of women and its frequent endorsement of violent sex.[54] The evidence of a correlation between sexually explicit material (whether or not legally obscene) and sexual crimes continues to mount.[55]

4. Precedent.

This Court acknowledged the "lesser" First Amendment protection for nonobscene erotic material in the plurality opinion in *Young v. American Mini Theatres,*

---

[53] Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. at 563 n.5 (*quoting* Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 456).

[54] *E.g.*, A. Dworkin, *Pornography: Men Possessing Women* (1981); S. Griffin, *Pornography and Silence* (1981); K. Barry, *Female Sexual Slavery* 174-214 (1979); Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 Harv. Women's L.J. 5 (1984).

[55] *E.g.*, *Pornography and Sexual Aggression* (N. Malamuth &. E. Donnerstein eds. 1984); Donnerstein, *Pornography and Violence against Women: Experimental Studies*, in *Pornography and Censorship* 219 (D. Copp & S. Wendell eds. 1983); Malamuth & Donnerstein, *The Effects of Aggressive Pornographic Mass Media Stimuli*, in 15 Advances in Experimental Social Psychology 103 (1982); Strickling, Copp & Wendell, *Selected Bibliography of Social Science Essays*, in *Pornography and Censorship, supra* at 311.

Inc.:

> [T]here is surely a *less* vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . ."[56]

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's *interest in protecting this type of expression is of a wholly different, and lesser*, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[57]

The Court's finding of a "lesser" First Amendment protection for erotic material was clearly the premise for its findings that reasonable regulation of such material does not abridge freedoms of speech and press and that content-based regulation of sexually explicit material does not violate equal protection.[58]

---

[56] 427 U.S. at 61 (plurality opinion) (emphasis added).

[57] *Id.* at 70 (plurality opinion) (emphasis added).

[58] *E.g.*, *id.* at 96 (dissenting justices' "forthright rejection of the notion that First Amendment protection is diminished for 'erotic materials'"); Stansberry v. Holmes, 613 F.2d 1285, 1288

The Court referred to that premise, neither reaffirming nor repudiating it, and made similar findings in terms of sustaining reasonable regulation despite its content discrimination toward nonobscene erotic material, in *City of Renton v. Playtime Theatres, Inc.*[59] Likewise, in *Bethel School District No. 403 v. Fraser,*[60] the Court determined that "the penalties imposed [for an indecent speech] were unrelated to any political viewpoint," and thus could be imposed. The Second Circuit, along with other courts, has noted that "[r]elevant Supreme Court decisions suggest that a similar 'middle level' protection is appropriate for certain kinds of speech, for example in areas of regulation of commercial advertising [and] zoning of theaters which play 'adult' but not obscene films."[61]

Other decisions, besides *Mini Theatres* and the advertising and libel and expressive conduct analogies, support the proposition that erotic material is only intermediately protected expression.[62] These

---

(5th Cir.) ("Young affords certain 'speech' activities lesser protection"), *cert. denied*, 449 U.S. 886 (1980); Note, *Constitutional Law--First Amendment--Content Neutrality, Young v. American Mini Theatres, Inc.*, 28 Case W. Res. L. Rev. 456, 478 (1978); Comment, *The Supreme Court, 1976 Term--Constitutional Law*, 90 Harv. L. Rev. 58, 200 (1976)(same).

[59] 475 U.S. at 47 ("To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theatres.")

[60] 478 U.S. 675, 685 (1986).

[61] S.E.C. v. Lowe, 725 F.2d 892, 901 n.6 (2d Cir. 1984), *rev'd* on other grounds, 472 U.S. 181 (1985).

[62] While the Supreme Court considered cases involving sex-related films in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), and Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), neither case

decisions involve nonobscene but indecent speech, nonobscene but erotic expressive conduct, and obscenity itself with a variable scope, all of which tacitly (and sometimes explicitly) recognize a role for intermediate protection in First Amendment doctrine.

The Supreme Court in *FCC v. Pacifica Foundation*,[63] in sustaining under the First Amendment a statutory prohibition against broadcast of nonobscene "indecent" speech,[64] permitted regulation of sexually explicit expression[65] that would not have been constitutionally permissible for fully protected speech or press. That ruling implicitly indicates a lesser First Amendment protection for such nonobscene material. In fact, the plurality opinion stated that such "patently offensive references to excretory and sexual organs and activities" "lie at the periphery of First Amendment concern," and that "[t]heir place in the hierarchy of First Amendment values was . . . . 'no essential part of any exposition of ideas' . . . ."[66]

---

involved an ordinance regulating sexually-explicit films or publications and both regulated fully-protected films as well as arguably erotic ones. The ordinance in Interstate Circuit concerned classification of films encouraging "sexual promiscuity," 390 U.S. at 687, and that in Erznoznik concerned any nudity at all visible from public roads, 422 U.S. at 213, rather than sexually-explicit films. In Mini Theatres, both the plurality opinion and the concurring opinion (written by the author of the Erznoznik opinion) distinguished Erznoznik on this basis. 427 U.S. at 72 n.35, 83.

[63] 438 U.S. 726 (1978).

[64] *Id.* at 744 (plurality opinion); *id.* at 756, 761 (Powell, J., concurring).

[65] *Id.* at 743.

[66] *Id.* at 743, 746 (*quoting* Chaplinsky v.

The Court in *LaRue*,[67] in upholding a regulation of sexually explicit dancing, films, and pictures in bars with liquor licenses, also recognized the lesser First Amendment protection of such erotic entertainment and materials as compared with political, artistic, literary, and scientific speech and press. The majority stated that, while "at least some of the performances [and films and pictures] to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression," they are not "the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater."[68] Consequently, "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases."[69]

The obscenity decisions of the Supreme Court, in *Miller v. California*[70] and other cases, have implicitly found less constitutional protection for sexually explicit material on the periphery of obscenity. Those decisions have permitted variation in the three factors constituting obscenity, with the effect of shifting erotic material into the obscenity category in some cases and out of that unprotected category in others; such variation would not be permissible for fully protected speech and press. That variation in-

---

New Hampshire, 315 U.S. 571-72).

[67] 409 U.S. at 118. *See* New York State Liquor Auth. v. Bellanca, 452 U.S. at 715-18 (1981) (per curiam) (upholding prohibition of topless dancers in establishments with liquor licsenses as "a reasonable restriction").

[68] 409 U.S. at 118.

[69] *Id.* at 117. *Accord*, Doran v. Salem Inn, Inc., 422 U.S. at 932.

[70] 413 U.S. 15, 25-26 (1973).

cludes patent offensiveness as determined by different community standards,[71] prurient appeal as influenced by the deviant nature of the recipient group,[72] and all three *Miller* factors as adjusted for the minority age of the recipient individuals.[73]

II. AS INTERMEDIATELY PROTECTED SPEECH, NONOBSCENE SEXUALLY EXPLICIT SPEECH IS SUBJECT TO MORE LIMITATIONS THAN FULLY PROTECTED SPEECH, INCLUDING THE LIMITATIONS INHERENT IN RICO FORFEITURE.

For intermediately protected expression, the First Amendment often has been and should be viewed as permitting greater regulation generally. For commercial advertising, the Supreme Court's decisions "allow[] modes of regulations that might be impermissible in the realm of non-commercial expression."[74] The state

---

[71] *Id.* at 30.

[72] *E.g.*, Mishkin v. New York, 383 U.S. 502, 509-09 (1966).

[73] *E.g.*, Ginsberg v. New York, 390 U.S. 629, 638 (1968); *see* New York v. Ferber, 458 U.S. 747 (1982) (child pornography).

[74] Friedman v. Rogers, 440 U.S. at 10-11 n.9, (*quoting* Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 456). *Accord, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 2276 (1985); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 65 (1983); In re R.M.J., 455 U.S. 191, 203 (1982); Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n, 447 U.S. 557, 563 (1980); Kleiner v. First National Bank, 751 F.2d 1193, 1204 (11th Cir. 1985) ("Commercial speech is subjected to stricter governmental regulations, consistent with the 'subordinate position in the scale of First Amendment'

can prohibit misleading and deceptive as well as false advertisements,[75] suppress advertising concerning illegal transactions,[76] require necessary warnings or disclaimers on commercial advertisements,[77] and prohibit attorneys' solicitation for nonideological litigation or broadcast advertising for cigarettes.[78] Likewise, the First Amendment has been and should be viewed as permitting other limitations of intermediately protected expression to which fully protected expression are not subject. For example, "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[79]

---

values assigned commercial speech.").

[75] *E.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. at 2275; Bolger v. Youngs Drug Products Corp., 463 U.S. at 69; In re R.M.J., 455 U.S. at 203; Friedman v. Rogers, 440 U.S. at 9; Bates v. State Bar, 433 U.S. 350, 383 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 771-72 & n.24.

[76] *E.g.*, Bolger v. Youngs Drug Products Corp., 77 L.Ed. 28 at 47; Village of Hoffman Estates v. Flipside, 455 U.S. 489, 496 (1982); Bates v. State Bar, 433 U.S. at 384; Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. at 388.

[77] *E.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 772 n.24; Warner-Lambert Co. v. FTC, 562 F.2d 749, 758-59 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

[78] *E.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

[79] Gertz v. Robert Welch, Inc., 418 U.S. at

Nonobscene sexually explicit expression is also subject to greater regulation and limitation, short of total prohibition, than is fully protected expression, as the Supreme Court's decisions in *Mini Theatres*, *Bellanca*, *LaRue*, and *Pacifica Foundation* evince.[80] Although the plurality in *Mini Theatres* observed in a footnote that the Detroit "situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting

---

347-48. *Accord*, Dunn & Bradstreet, Inc. v. Greenmoss, 472 U.S. 749, (1985); Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 499 (1975); Cantrell v. Forest City Pub. Co., 419 U.S. 245, 250 (1974); Bichler v. Union Bank & Trust Co., 715 F.2d 1059, 1063, *reh'g granted, vacated,* 718 F2d 802; (6th Cir.); Schultz v. Newsweek, 668 F.2d 911, 918 (6th Cir. 1982); Clark v. American Broadcasting Companies, 684 F.2d 1208, 1214 n.4 (6th Cir. 1982), *cert. denied,* 460 U.S. 1040 (1983); Brewer v. Memphis Pub. Co., 626 F.2d 1238, 1246 (5th Cir. 1980), *cert. denied,* 452 U.S. 962 (1981).

[80] *Schad* is not contrary to this rule, because the ordinance there excluded all live entertainment from commercial zones, and thereby "prohibit[ed] a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments," 452 U.S. at 65, as well as prohibiting partially protected nude dancing from adult establishments. *Doran* is also not contrary, because it found unconstitutional a total prohibition of topless dancing in establishments without liquor licenses that would have been constitutional if limited to establishments with liquor licenses. New York State Liquor Auth. v. Bellanca, 452 U.S. at 716-17. Vance v. Universal Amusement Co., 445 U.S. 308 (1980)(per curiam), is not contrary, because it involved total prohibition of erotic material under a public nuisance statute without a judicial finding of obscenity. And *Erznoznik* is not contrary. Note 62, *supra*.

access to, lawful speech,"[81] it meant that such a great restriction would be "more than a limitation on the place,"[82] and it did not identify erotic material as sufficiently protected "lawful speech" to change the situation. Such expression is subject to the limitations presented by this case.

A. Nonobscene Sexually Explicit Speech Is Properly Subject to Any Self-censorship Inherent in RICO Forfeiture.

While petitioner in this case confines his arguments to the effect of forfeiture upon post-forfeiture speech, his repeated references to the potentially tremendous impact of such forfeiture imply that booksellers, theater owners and other vendors of sexually explicit materials will feel an unconstitutional chilling effect and will censor such materials themselves. Forfeiture certainly does not appear as horrific as petitioner attempts to paint it if the person subject to forfeiture may avoid it simply by refraining from selling obscenity, but to avoid selling obscenity, such vendors may cautiously censor nonobscene sexually explicit materials.

Of course, the Court has previously refused to identify the inducement to such self-censorship as a constitutional violation:

> [D]eterrence of the sale of obscene materials is a

---

[81] 427 U.S. at 71 n.35 (plurality opinion).

[82] *Id.* at 71. The text of the opinion, to which footnote 35 relates, states: "Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited,[35] even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures." *Id.* at 71-72.

> legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." *Smith v. California*, 361 US 147, 154-155, 4 L Ed 2d 205, 80 S Ct 215, 14 Ohio Ops 2d 459 (1959). *Cf. also Arcara v. Cloud Books, Inc.*, 478 US 697, 706, 92 L Ed 2d 568, 106 S Ct 3172 (1986).[83]

In addition, any increased inducement to self-censorship caused by the addition of forfeiture to other criminal punishments does not violate the First Amendment because nonobscene sexually explicit speech is only intermediately protected. To deny to the people such a valuable tool against harmful obscenity and racketeering solely because it impinges speech that implicates First Amendment values in only a marginal way is unreasonable. The majority in *Mini Theatres*, in denying standing for a vagueness challenge, gave the following rationale:

> Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinance is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.
>
> . . . . The fact that the First Amendment protects some, though not necessarily all, of that material from total suppression does not warrant the further conclusion that an exhibitor's doubts . . . involves the kind of threat to the free market in ideas and expression that

---

[83]Fort Wayne Books, Inc. v. Indiana, 103 L.Ed.2d 34, 49 (1989).

> justifies the exceptional approach [of overbreadth standing] to constitutional adjudication recognized in cases like *Dombrowski* . . . .[84]

The decisions in *Pacifica Foundation* and *LaRue* support this point as well.[85]

B. Nonobscene Sexually Explicit Speech Is Properly Subject to Any Overbroad Regulation of Obscenity Inherent in Rico Forfeiture.

Petitioner's argument that forfeiture may constitute overbroad regulation is of course merely another way of

---

[84]427 U.S. at 61.

[85]FCC v. Pacifica Foundation, 438 U.S. at 743 (plurality opinion) (because such "references to excretory and sexual organs and activities" "lie at the periphery of First Amendment concern," the Court "decline[d] to administer that medicine" of "[i]nvalidating any rule on the basis of its hypothetical application to situations not before the Court"); California v. LaRue, 409 U.S. at 118-19 & n.5 (1972) (the Court there "refused to apply the overbreadth doctrine" to regulation of sexually explicit dancing, films, and pictures in establishments with state liquor licenses).

Although Erznoznik found an ordinance overbroad that prohibited exhibition of films containing any nudity and visible from public streets, it involved fully protected expression that was impermissibly regulated through the ordinance's overbreadth as well as (partially protected) sexually explicit films that were as here permissibly regulated; Note, *Using Constitutional Zoning to Neutralize Adult Entertainment--Detroit to New York*, 5 Fordham Urb. L.J. 455, 463 (1977). It was distinguished on this basis by a majority in Mini Theatres. 427 U.S. at 72 n. 35 (plurality opinion); *id.* at 83 (Powell, J., concurring).

saying that the government may not punish by confiscating assets rather than imposing prison terms. The word "overbreadth" may apply to forfeiture in the sense that nonobscene assets are subject to forfeiture for predicate acts involving obscenity, but the doctrine, that statutes or regulations may be facially invalid because they authorize prosecution of protected activity, does not. Only the illegal obscenity-related conduct is being prosecuted.

Even if the doctrine of overbreadth were applicable to forfeiture, however, the doctrine would not prevent the forfeiture of nonobscene sexually explicit material. Since such material, like commercial speech, has limited First Amendment value and is only intermediately protected, the *threat* posed by an overbroad statute or regulation, like the threat posed by vagueness, is marginal and therefore tolerable. Intermediately protected erotic material, like commercial advertising, "may be more durable than other kinds" of speech and press because through its integral relation to "commercial profits . . . there is little likelihood of its being chilled by proper regulation and foregone entirely."[86] The Court has held that "the overbreadth doctrine does not apply to commercial speech."[87] That doctrine[88]

---

[86]Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 772 n.24. *See also* Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. at 571 n.13.

[87]Village of Hoffman Estates v. Flipside, 455 U.S. at 497. *Accord, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Servic. Comm'n, 447 U.S. at 565 n.8; Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 635 (1980); Bates v. State Bar, 433 U.S. at 380-81.

[88]Bigelow v. Virginia, 421 U.S. 809, 816-17 (1975); Laird v. Tatum, 408 U.S. 1, 13-14 (1972). Although it may appear to apply overbreadth analysis to intermediately-protected expression, *Bigelow*

should not be applied to *any* intermediately protected expression, including nonobscene sexually explicit speech.

C. Nonobscene Sexually Explicit Speech Is Properly Subject to Any Prior Restraint Inherent in RICO Forfeiture.

Even if the Court accepts Petitioner's argument that forfeiture of expressive materials is a prior restraint rather than simply punishment for criminal violations, nonobscene sexually explicit materials are legitimately subject to forfeiture because they are properly subject to prior restraints. Just as for commercial advertising "the different degree of protection" "may also make inapplicable the prohibition against prior restraints,"[89] the different degree of protection

---

involved a fully protected constitutional right with apparent First Amendment ties that invoked overbreadth analysis, *see* Roe v. Wade, 410 U.S. 113 (1973), and the Supreme Court expressly declined to rely on overbreadth grounds, 421 U.S. at 817-18.

[89]Friedman v. Rogers, 440 U.S. at 10 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 772 n.24). *Accord, e.g.*, Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. at 571 n.13; *see* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464 (1978) (upholding bar rules against partially protected attorneys' solicitation "whose objective is the prevention of harm before it occurs"); Comment, *FTC v. Simeon Management Corp.: The First Amendment and the Need for Preliminary Injunctions of Commercial Speech*, 1977 Duke L.J. 489, 501-10 (injunctions against commercial speech do not violate prior restraint rule). The prior restraint rule does not apply to unprotected expression such as obscenity. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Near v. Minnesota, 283 U.S. 697, 716 (1931).

Moreover, the prior restraint rule, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per

afforded sexually explicit materials subjects them to prior restraints. Just as cigarette advertisements may be banned from television,[90] nonobscene "indecent" language may be prohibited,[91] and, logically, nonobscene sexually explicit material may be subject to forfeiture.

In fact, in response to a prior restraint challenge in *Arcara v. Cloud Books, Inc.*,[92] the Court stated:

> [U]nlike the symbolic draft card burning in O'Brien, the sexual activity carried on in this case manifests absolutely no element of protected expression. In *Paris* . . . , we underscored the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct. First Amendment values may not be invoked by merely linking the words "sex" and "books."

CONCLUSION

For the foregoing reasons, CLD respectfully urges this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

---

curiam); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), does not absolutely prohibit prior restraints. Times Film Corp. v. City of Chicago, 365 U.S. 858 (1961); Near v. Minnesota, 283 U.S. at 716.

[90] Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972), *aff'g mem.* 333 F.Supp. 582 (D.D.C. 1971).

[91] F.C.C. v. Pacifica Foundation, 438 U.S. at 744 (plurality opinion).

[92] 478 U.S. 697, 705 (1986).

Respectfully submitted,

Wendell R. Bird*
David J. Myers
Timothy W. Townsend
Bird & Associates
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400

*Counsel of Record

Attorneys for Amicus Curiae